

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARIUS DEON GREEN,

Defendant-Appellant.

UNPUBLISHED

June 13, 2006

No. 261041

Wayne Circuit Court

LC No. 04-010695-01

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, receiving a stolen motor vehicle, MCL 750.535(7), and fleeing and eluding in the third degree, MCL 257.602a(3)(a). Defendant received concurrent sentences of 26 years and 3 months to 40 years' imprisonment for second-degree murder, 90 days time served for receiving a stolen motor vehicle, and three to five years' imprisonment for fleeing and eluding in the third degree. We affirm.

This case stems from a collision defendant caused while fleeing the police, which resulted in the death of the victim. Defendant first claims that the cumulative effect of misconduct during the prosecutor's closing argument deprived him of fair trial. We disagree. To properly preserve a claim of prosecutorial misconduct, a defendant must promptly and specifically object to the offensive statements. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Because defendant did not object below, appellate review is for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Reversal will only be warranted where there is plain error that affected the outcome of the trial and that resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Generally, the test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Callon*, *supra* at 330. The propriety of a prosecutor's remarks will depend upon the particular facts of each case. *Id.* In addition, a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.*

We shall first address defendant's contention that the prosecutor appealed to the sympathy and emotions of the jury by favorably describing the victim of the crime. The prosecutor began her closing argument by noting that this was "a case and a story about two people; one who never had a chance and one who thinks he deserves another chance."

And at the risk of reminding you what a horrible wreck this was – not at the risk – I want to remind you and I want you to keep this in your minds at all times because this changed the lives of a whole family, left a family without the baby of the family, the youngest girl.

This left a young child without a mother. Snuffed out every opportunity she would ever have to have any kind of life from that day forward.

And I would remind you that this was an innocent – truly innocent – person who was doing right; coming home from work to take care of her child. Working hard to make a living to make ends meet.

So what did [the decedent] get as a result of this, compared to what [defendant] has to look forward to as a result of this?

This is what happened to [defendant]; this is what he got out of the case. A little scratch there on him (indicating). Okay? Don't forget that.

That's what [the decedent] got out of this (indicating), and that's what [the decedent] got out of this (indicating), and this is what [the decedent] got out of this, her picture in a funeral program (indicating).

Appeals to the jury to sympathize with the victim constitute improper argument. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, the prosecutor's comments were isolated and did not blatantly call for conviction based on sympathy for the victim. *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Rather, the bulk of the prosecutor's closing argument focused on the evidence and the credibility of the prosecution's primary witness. Comments about the victim served as reminders that the jury was deciding a real case in which a real person died. Further, a prosecutor's argument that justice should be done is not error warranting reversal. See, e.g., *People v Hedelsky*, 162 Mich App 382, 385-386; 412 NW2d 746 (1987).

Defendant also argues that the prosecutor engaged in misconduct by denigrating him and appealing to the jurors' fears. A prosecutor must not denigrate a defendant with intemperate and prejudicial remarks. *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). However, a prosecutor need not confine her remarks to the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

In her closing, the prosecutor stated that defendant was the kind of person who did not take responsibility for his actions and showed no remorse for the death that occurred. She also noted that defendant did not work for a living as did the decedent. However, when read in context, it is apparent that the majority of the remarks concerned defendant's mental state during and after the commission of the crime, which was relevant to the jury's deliberations. Further, to

the extent that the remarks were inappropriate, they were not highly prejudicial and were amenable to correction by an instruction from the court upon defendant's objection. If a curative instruction could have alleviated any prejudicial effect of prosecutorial misconduct, this Court will not find error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Finally, defendant objects to the prosecutor's statements to the jury that it should not give defendant "a break." During her closing, the prosecutor repeatedly argued that defendant wanted the jury to let him get away with what he had done and admonished the jury to not give him another chance.

How do we know that he wants another chance? Well, we know that because this is the kind of manipulative person who gets away with things, and gets away with things, and gets away with things, and thinks he's going to keep on getting away with things.

He actually tried to convince his friend to come to court and say he was driving the car. He's been getting over all his life and he's counting on you people in the jury to let him get over again. Don't let him do it.

[The decedent] is not ever going to have another chance again and he doesn't deserve a break. He doesn't deserve a break one bit.

* * *

And when the officers ask him if he's seen anybody running, he sees – the officer testifies – he relaxes; I got over again. That's what he's thinking and he thinks he's going to get over again today and I beg you not to let him get over again today.

He's gotten over one too many times, and ruined one too many lives – more than one life, the life of this whole family.

* * *

I think you can very clearly see from his actions and the actions he took after he murdered [the decedent], that this is the kind of person who has no remorse, who has no consideration for anybody but himself. And if he doesn't have to pay the consequences this time, that kind of behavior and that kind of attitude will continue.

* * *

This man – and he is a man, he is an adult in the eyes of the law – does not deserve a break from you whatsoever. I implore you not to give it to him because [the decedent] didn't get a break.

And someday, probably 15/16 years from now, [the decedent's son] son, is going to want to know what happened to the man that took mommy away. And

the answer cannot be, he got slapped on the hand and was allowed to do this to someone else.

During her rebuttal argument, the prosecutor again implored the jury to not give defendant a break, but rather asked it to hold defendant accountable for what he did.

By telling the jury that it should not let defendant get away with what he had done and warning that, if it did let defendant get away, he would harm someone else, the prosecutor in effect argued that the jury had a civic duty to convict defendant. It is improper for a prosecutor to argue that it is the jury's civic duty to convict the defendant by appealing to the fears and prejudices of jury members. *Bahoda, supra* at 282. However, although the prosecutor's closing remarks were improper, we conclude that defendant's trial counsel's closing argument and the trial court's instructions cured any prejudicial effect that these remarks might have had.

Defendant's trial counsel began his closing by responding to the prosecutor's remarks.

Ladies and gentlemen, emotions should not take part in this situation whatsoever.

I appreciate the position of the prosecution and the family of the deceased. Don't get me wrong, I understand that.

But you have to look at the facts of this case and try the best you can to set aside what your emotions may think you ought to do.

The request by the prosecution not to slap this man on the hands for what the prosecution thinks he may have done is not your decision. Your decision here is to listen to the facts, apply the law to it, and reach a decision. Whatever that decision is, is based upon the facts and not the emotions of this case.

It's unfortunate that this lady met her demise in that fashion. I agree with that. But that in and of itself is not a reason for you to stand up and say, okay, he did it.

Thereafter, defendant's trial counsel discussed the witnesses and evidence presented. He then closed his remarks by stating,

I would ask you to take all of these matters into consideration in an unemotional manner, sit and decide the facts and, make a decision that you can live with. That's all I can ask. And whatever decision you make is a proper one.

In addition, the court instructed the jury that it must base its verdict on the evidence and not allow sympathy or prejudice to influence its decision. It also told the jury not to consider any statements by the attorneys as evidence. The court further gave general instructions about how to consider witness testimony and make credibility determinations. Absent a contrary showing, jurors are presumed to follow their instructions. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). When combined with defendant's trial counsel's closing remarks, the

jury instructions cured any prejudice that might have been caused by the prosecution's remarks. *Mayhew, supra* at 123.

Finally, even if the instructions and closing remarks were inadequate to cure the prejudicial effect of the remarks, we conclude that any error was harmless in light of the overwhelming evidence against defendant. See *People v Mezy*, 453 Mich 269, 285-286; 551 NW2d 389 (1996).

At trial, testimony established that police officers began to follow a Jeep, which was suspected of being stolen. The testimony further established that after the police began to follow the Jeep, it sped up. Thereafter, the Jeep wove in and out of traffic, disregarded traffic signals, and even drove down the wrong side of streets. Testimony established that this occurred at speeds ranging from 45 to 85 miles per hour, at dusk and in a residential neighborhood. The Jeep did not stop until it ran through a red light going the wrong way and slammed into a Ford Focus. Witnesses testified that the collision was so forceful that it actually propelled the engine and transmission from the Focus. Testimony also established that the driver of the Focus died of her injuries. Hence, there was overwhelming evidence that the driver of the Jeep drove recklessly in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm and, as a result of this wanton and willful driving, caused the death of another person.

In his defense, defendant attempted to call into doubt his identification as the driver of the Jeep. However, there was also overwhelming evidence that he was the driver.

Kurtis Brown testified that he was defendant's friend and that, on the evening of the accident, defendant drove by in a Jeep and picked him up. He also said defendant was wearing a Celtics jersey and blue jean shorts and that the Jeep had a popped ignition. Other witnesses also identified the driver as wearing a Celtics jersey and jean shorts. Likewise, testimony established that defendant was apprehended two blocks south of the accident site and that he discarded a Celtics jersey and pair of jean shorts as the police approached. One officer also testified that, after defendant was apprehended, he asked them, "will you get my clothes off of the hood?" This same officer testified that the jean shorts were found with an ignition cylinder in the pocket. Finally, testimony also established that there was blood on the passenger door of the Jeep and that defendant did not have any significant cuts, but that Brown had to have sixteen stitches in his right hand. Although defendant's trial counsel attempted to undermine this testimony, taken as a whole it is overwhelming evidence that defendant was the driver of the Jeep. Consequently, we conclude that any improper comments by the prosecutor did not affect the outcome of the trial. Therefore, there was no error warranting reversal. *Carines, supra* at 763.

Relying on *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974), defendant next argues that the court erred by not sua sponte giving the jury an accomplice instruction for the testimony by Brown where the issue of his credibility was closely drawn. Defendant further contends that this error warrants reversal. We disagree. Because defendant indicated satisfaction with the jury instructions, any claim of error was waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Even if defendant had not waived this argument, we would conclude that this unpreserved claim of error does not warrant reversal. See *People v Young*, 472 Mich 130, 143;

693 NW2d 801 (2005) (rejecting the *McCoy* “closely drawn” rule and holding that an unpreserved claim that the court improperly failed to give an accomplice instruction may be reviewed only for plain error that affects substantial rights). Because no record evidence indicated that Brown assisted in the planning or commission of the crimes or otherwise participated as an accomplice, an accomplice instruction was not warranted. See *People v Ho*, 231 Mich App 178, 188-189; 585 NW2d 357 (1998) (holding that an accomplice instruction is not warranted where there is no evidence that the alleged accomplice was involved in the crime). Furthermore, the jury was aware of potential problems with the credibility of the witness. The prosecutor devoted a significant portion of her closing argument to arguing for his credibility in response to defendant’s contention that the witness was lying to avoid trouble. Defendant also cross-examined Brown, challenging his version of the events. In his closing argument, defendant attacked Brown’s credibility. Any problems with Brown’s credibility were plainly apparent to the jury and, therefore, the trial court was not required to give an accomplice instruction. *People v Reed*, 453 Mich 685, 692-693; 556 NW2d 858 (1996). Consequently, there was no plain error warranting reversal.

In his final argument, defendant claims that his trial counsel was constitutionally ineffective for failing to request an instruction on accomplice testimony. Because defendant did not move for a new trial or a *Ginther*¹ hearing, this Court’s review of his claim of ineffective assistance of counsel is limited to mistakes apparent from the record. *People v Barclay*, 208 Mich App 670, 672, 528 NW2d 842 (1995).

As noted, there is no evidence to support defendant’s contention that Brown was an accomplice. Thus, any request by defendant’s counsel for an accomplice instruction would have been denied for lack of evidentiary support. See *Ho*, *supra* at 188-189. Defendant’s counsel is not ineffective for failing to make futile motions upon which the trial court would have ruled adversely. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). In any event, defendant’s counsel mounted more than a sufficient challenge to Brown’s credibility in cross-examination and during closing arguments.

There were no errors warranting a new trial.

Affirmed.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

¹ *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).